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BEFORE THE

AMERICAN ARBITRATION ASSOCIATION

PAUL VELIZ, *et al.*, On Behalf of Themselves and All Others Similarly Situated, Claimants, vs. CINTAS CORPORATION, an Ohio corporation, Respondent.	AAA Case No. 11 160 01323 04 **RESPONDENT CINTAS CORPORATION'S MOTION FOR CLAUSE CONSTRUCTION** **[AAA Supplemental Rule for Class Arbitration, Rule 3]**

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I. INTRODUCTION

In this arbitration, fifteen (15) former employees of Cintas Corporation ("Cintas"), purporting to represent a class of similarly situated persons, claim that Cintas improperly designated them as "exempt" employees under federal and state overtime laws (the "Named Claimants").[1] Under Rule 3 of the American Arbitration Association's Supplemental Rules for Class Arbitration ("Supplemental Rules" or "Suppl. Rules"), as a threshold matter, the Arbitrator must determine whether the individual arbitration agreements between Cintas and the Named Claimants (the "Arbitration Agreements") permit arbitration to proceed on behalf of the class identified by the Named Claimants.[2] Because the express terms of the Arbitration Agreements do not themselves permit class or collective proceedings in arbitration, the Arbitrator must issue a Clause Construction Award so ruling. Further, the Arbitrator must also rule that these Named Claimants cannot proceed collectively either by themselves or on behalf of others because doing so would directly contradict express terms in the Arbitration Agreements and is not consistent with the law.

II. SUMMARY OF ARGUMENT

It is the Named Claimants' burden to show that the terms of the Arbitration Agreements themselves "permit arbitration to proceed on behalf of … a class." Suppl. Rule 3. There is, however, no language in the Arbitration Agreements that can be said to permit class arbitration. Indeed, to rule that the Arbitration Agreements permit arbitration to proceed on behalf of a class

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[1] The claimants identified in the Demand for Arbitration as purporting to represent others in this arbitration are Paul Veliz, James White, Mark Chainuck, Tade L. Wasmer, Jeff Jay, Aaron Zadnick, Earl C. Woods, Jr., Bobby Hodge, Amber Kelly and Samuel Williams. Cintas notes, however, that five other plaintiffs named as class representatives in the First Amended Complaint were also compelled to arbitrate: Tom Jaramillo, Mark Fragola, John Cruz, Bryan Cruse and Julian Nazareth. To eliminate any doubts, Cintas treats these others as Named Claimants for purposes of this motion, even though their status as such is unclear from the Demand for Arbitration.

[2] The employment agreement between Cintas and the each of the Named Claimants that contains the relevant arbitration provision are attached to the Declaration of Joseph A. Meckes ("Meckes Decl.") as Exhibit 1. Those agreements are referred to herein as the "Arbitration Agreements."

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would require the Arbitrator to ignore and to invalidate several of the Arbitration Agreements' express terms. Because there is no term in the Arbitration Agreements that permits class nationwide proceedings (and many terms confirm that it is not permitted), the Named Claimants cannot meet their burden and, therefore, cannot proceed as a class or collectively in this arbitration.

First and foremost, the language of the Arbitration Agreements is not amenable to an interpretation that permits class arbitration because an employee is only allowed to initiate arbitration of a claim if he or she has first tried informally to resolve that specific claim with Cintas. It is only *after* those efforts have failed that any employee has the right to arbitrate a dispute that he or she tried in good faith, but failed, to resolve with Cintas. Because no individual employees have the right or authority to resolve claims on behalf of a class, class disputes are simply not arbitrable, and the Arbitration Agreements cannot be construed to permit class proceedings.

Second, each of the Arbitration Agreements contains an express place-of-arbitration term requiring that any arbitration be held in the state and county where the individual employee last worked for Cintas. At the very least, this term—which Judge Armstrong has already held to be enforceable—does not allow the kind of multi-state class or collective arbitration that the Named Claimants are seeking here. The place-of-arbitration term also confirms that the parties did not intend to permit their disputes to be resolved on a class basis or collectively in a place remote from the locations where each of the employees involved last worked for Cintas.

Permitting class or collective proceedings despite the place-of-arbitration term would also be inconsistent with the contractual requirement that arbitration be a "fair, timely and efficient" manner of resolving disputes. Only through arbitration locally pursuant to the place-of-arbitration term, where Cintas can present its individual defenses to putative class members' overtime claims, can Cintas obtain a fair arbitration, to which it is entitled under the terms of each of the parties' agreements.

Other terms of the Arbitration Agreements also strongly confirm that the parties did not intend to permit arbitration to proceed on behalf of a class. For example, the contractual one-year

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limitations period that expires one year after the claim arose or one year after the individual claimant left Cintas' employ is inconsistent with an intention to permit such claimants to proceed on behalf of a class. Further, the language in the 1999 and 2001 agreements limiting a claimant's share of the initial filing fee to $100 further indicates that the parties expected only individual claims in arbitration. If the parties had intended to permit class or collective proceeding they certainly would have addressed how costs would be allocated if claimants undertook to proceed collectively or on behalf of a class.

There is no term in the Arbitration Agreements and no legal principles that can assist the Named Claimants in meeting their burden. In the only court opinion reviewing a clause construction award published on the Class Arbitration Docket of the American Arbitration Association ("AAA"), the reviewing court held that an arbitral panel exceeded its authority when it construed an agreement to permit class arbitration even though the agreement was silent on the subject and the parties' intent could not be discerned. *DirecTV v. Cable Connection Inc. et al.*, Case No. BS095987 (Los Angeles Superior Court, Nov. 11, 2005). Meckes Decl. Ex. 21. *DirecTV* holds that to interpret an arbitration agreement to somehow permit class arbitration under these circumstances violates basic maxims of contract construction by improperly inserting terms into the parties' agreement. *Id.*

Moreover, Judge Armstrong has issued rulings—which are binding in this arbitration—dictating that courtroom procedures, including the class mechanism, are not imported into arbitration and are not necessary for claimants in arbitration to vindicate their statutory rights. Meckes Decl. Ex. 8 at 4-6 (*Veliz* Dkt. No. 426). According to Judge Armstrong and the authorities she cited from the Unites States Supreme Court and various federal circuit courts of appeals, a plaintiff asserting claims under the Fair Labor Standards Act ("FLSA") forfeits any procedural right to proceed collectively that might otherwise be available under the FLSA when he or she agrees to arbitrate. *Id.* at 6.

Language in the Arbitration Agreements and in the National Rules for the Resolution of Employment Disputes ("National Rules") regarding the "remedies" and/or "relief" the Arbitrator is empowered to grant does not create any ambiguity as to whether the Arbitration Agreements

permit class proceedings. It is well established that procedural rights, including any right to proceed as a class, are considered neither "remedies" nor "relief" in any sense of those words.

The parties' explicit place-of-arbitration term and core legal principles also preclude the Named Claimants from pursuing their individual claims collectively or on behalf of other former or current Cintas employees. Initially, the individual arbitration agreements between the Named Claimants and Cintas dictate that these arbitrations be held in different counties across the country—not together in San Francisco. Even if the Arbitration Agreements were silent on the question of consolidation (which they are not by virtue of the place-of-arbitration term), because arbitral jurisdiction is derived solely from the parties' agreement to arbitrate, the Arbitrator would have no jurisdiction or authority to consolidate their claims or the claims of any other employees who entered into individual employment agreements with Cintas.

III. BACKGROUND AND RULINGS OF THE DISTRICT COURT BINDING IN THIS ARBITRATION

On March 19, 2003, a group of fifteen (15) plaintiffs filed an action against Cintas in the United States District Court for the Northern District of California alleging that Cintas improperly characterized them as exempt employees (the "District Court Action"). [3] From the outset, the District Court plaintiffs have tried every possible means to avoid their obligation to arbitrate in accordance with the terms of their agreements. Now that the District Court has unequivocally ruled that those agreements are enforceable according to their terms, several of the same plaintiffs who are subject to the Court's orders have shifted their strategy to the arbitral forum, still seeking to modify the terms of their agreements to obtain a tactical advantage.

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[3] Plaintiffs filed a First Amended Complaint on May 15, 2003, which added five additional plaintiffs. This First Amended Complaint was later incorporated by reference into claimants' Demand for Arbitration. Meckes Decl. Ex. 4.

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Under Supplemental Rule 1(c), however, the District Court's orders are binding in this arbitration. Thus, Cintas respectfully emphasizes that for the Arbitrator to understand the scope of his authority, as limited and defined by the District Court, it is necessary to review the District Court proceedings to date in some detail.

A. DISTRICT COURT MOTION TO COMPEL ARBITRATION AND MOTION FOR RECONSIDERATION

Shortly after Cintas was served with the summons and complaint in the District Court Action, Cintas moved to compel arbitration under the terms of the arbitration agreements between Cintas and the twenty (20) named plaintiffs as well as another forty-six (46) individuals who had by then "opted-in" to the case. Rather than accepting their obligation to arbitrate, plaintiffs fought tenaciously to keep their claims out of arbitration. On April 5, 2004, Judge Armstrong issued a 59-page order compelling almost all of the original named and opt-in plaintiffs to arbitration. Meckes Decl. Ex. 3 (*Veliz* Dkt. No. 140).

The Court's April 5, 2004 Order invalidated and severed a couple minor terms in certain jurisdictions, but held that the remaining terms of the Arbitration Agreements were enforceable as written.[4] *Id.* at 58-59. Because each agreement contained a governing law provision that required the Court to apply the law of the state where each individual named or opt-in plaintiff last worked for Cintas, the Court analyzed each plaintiff's agreement under the law of the place where each individual plaintiff had last worked for Cintas. *Id.* at 15. Applying the laws of the eleven (11) states as to the limited number of persons then at issue, the Court expressly rejected (with a few limited exceptions) plaintiffs' arguments that the arbitration agreements were unfair or adhesive in nature, accepting evidence presented by Cintas that the agreements were not presented on a take-it-or-leave-it basis and that there were no adverse consequences for employees who had declined to sign similar agreements. *Id.* at 18, 26, 38, 41, 47; *see also* Meckes

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[4] As to only those plaintiffs who were subject to that initial motion and who last worked for Cintas in the Second, Fourth, Fifth, Sixth, Ninth and Tenth Circuits, the Court invalidated a provision in an early version of the arbitration agreements that provided for cost-shifting to a claimant if he or she was the losing party as well the agreements' one-year limitations period. Meckes Decl. Ex. 3 at 59.

Decl. Ex. 8 at 11 (*Veliz* Dkt. No. 426). Ultimately, with respect to 56 named and opt-in plaintiffs, including the Named Claimants here, the Court found their agreements to be enforceable and compelled them to arbitrate.

Unhappy with Judge Armstrong's order compelling them to arbitrate, plaintiffs, including the Named Claimants here, sought reconsideration of the Court's April 5, 2004 Order on a number of grounds. First, plaintiffs argued that the costs of arbitration would prevent them from proceeding as a class. After initiating this arbitration, plaintiffs' counsel discovered that they had misapprehended the expenses associated with class arbitration proceedings. Meckes Decl. Ex. 6 at 4 (*Veliz* Dkt. No. 384). Plaintiffs argued to the Court that these costs would prevent them from effectively vindicating their statutory rights in arbitration because they would be unable to proceed on behalf of a class or collectively. *Id.*

In its May 4, 2005 Order, after extensive briefing, the Court dismissed this argument outright. Meckes Decl. Ex. 8 at 4-6 (*Veliz* Dkt. No. 426). The Court held that even if the costs of class arbitration stood as a *complete bar* to class proceedings, this would not preclude the plaintiffs from vindicating their statutory rights. *Id.* So long as they have the ability to proceed individually, the Court held that plaintiffs can effectively vindicate their statutory rights in arbitration even where class proceedings are *not* available. *Id.* The Court further held that even if the plaintiffs had previously had a procedural right under the FLSA to pursue a collective action, they had forfeited that right when they agreed to arbitrate their disputes with Cintas. *Id.* at 6 (citing *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996)).

Plaintiffs also argued that the Court should invalidate the place-of-arbitration provisions because their enforcement would "result in the fragmentation of claims that federal (and state) law authorizes to be brought in a single proceeding." Meckes Decl. Ex. 6 at 24 (*Veliz* Dkt. No. 384). Plaintiffs also asked the Court to invalidate the place-of-arbitration provisions because plaintiffs would "effectively be deprived of [their] day in court were the clause enforced." *Id.* at 23. Thus, plaintiffs contended that "because Cintas' forum selection clause would discourage (if not render impossible) the enforcement of federal labor law protections, that clause is unenforceable and unconscionable for that reason as well." *Id.* at 24.

The Court rejected plaintiffs' arguments outright and specifically ruled that plaintiffs had waived any arguments that the place-of-arbitration provisions were unfair or otherwise unenforceable:

> Plaintiffs did not assert that the place-of-arbitration provisions in the arbitration agreement were unenforceable in briefing on Defendant's Motion to Compel Arbitration, nor did Plaintiffs raise it as grounds for relief in its Motion for Reconsideration pursuant to Civ. L.R. 7-9. Accordingly, to the extent plaintiffs argue that these provisions are unfair, they have waived those arguments.

Meckes Decl. Ex. 8 at 12 n.8 (*Veliz* Dkt. No. 426). Because Judge Armstrong has already ruled that Named Claimants have waived any arguments that the place-of-arbitration provision is unfair, unconscionable or otherwise unenforceable, those issues have been resolved. Moreover, under Supplemental Rule 1(c) and otherwise, this Arbitrator has no jurisdiction or discretion to consider any such argument.

The Court went on to state that, solely as to the 56 plaintiffs it had compelled to arbitrate, it was powerless to enforce the place-of-arbitration provisions under Section 4 of the Federal Arbitration Act, which provides that the hearing on any arbitration compelled by the court "shall be within the district in which the petition for an order directing such arbitration is filed." *Id.* at 11-13. Notably, however, the District Court did not purport to limit Cintas' right to enforce those provisions in arbitration or direct that the AAA refrain from enforcing those provisions under the parties' agreements. *Id.* Indeed, as noted above, the Court held that plaintiffs had waived any argument that those provisions were not enforceable. *Id.* at 12 n.8.

B. PROCEEDINGS IN DISTRICT COURT AS TO OPT-IN PLAINTIFFS

Because the Court's April 5, 2004 and May 4, 2005 Orders had only applied to the 56 named and opt-in plaintiffs whom the Court had compelled to arbitrate, those Orders did not decide whether the approximately 2,200 opt-in plaintiffs who had opted in to the District Court Action in the interim were obligated to arbitrate and, accordingly, as of May 4, 2005, the matters as to those opt-in plaintiffs remained unsettled. In the summer of 2004, the parties had stipulated to an order compelling about eleven (11) opt-in plaintiffs from certain states to arbitration. But that stipulated order did not address whether their place-of-arbitration provisions would be

enforced or whether the District Court would compel the vast majority of the opt-in plaintiffs (approximately 1,900) to arbitration. Meckes Decl. Ex. 5 at 2 (*Veliz* Dkt. No. 160).

Although the Court's May 4, 2005 Order compelling these 56 plaintiffs to arbitrate in the Northern District of California did not in any way limit Cintas' right to enforce the relevant place-of-arbitration terms, plaintiffs' counsel had taken the position that an order under FAA Section 4 somehow gave plaintiffs license to proceed collectively and in violation of their express place-of-arbitration terms. Previously, at the first opportunity after plaintiffs' counsel first took that position, Cintas reserved the right to enforce the arbitration agreements of the remaining 1,900 opt-in plaintiffs, who were not subject to the Court's order, by moving to stay under FAA Section 3 and not moving in the Northern District of California to compel under Section 4. *See* Meckes Decl. ¶ 10; *see also, e.g.,* Meckes Decl. Ex. 7 at 23 n.35 (*Veliz* Dkt. No. 388).

Because a motion under Section 4 of the FAA in the District Court Action was unnecessary to enforce the arbitration agreements as to the remaining 1,900 opt-in plaintiffs, Cintas elected to move in the Northern District of California only for an order *staying* further litigation under Section 3 of the FAA until each of those approximately 1,900 plaintiffs had arbitrated their disputes with Cintas in accordance with the terms of each of their agreements. Meckes Decl. Ex. 9 (*Veliz* Dkt. No. 455). At the same time, to the extent those opt-in plaintiffs refused to arbitrate in the state and county where they last worked for Cintas, Cintas twice expressly reserved the right to move under Section 4 in the appropriate District Courts nationwide for an order compelling those plaintiffs to arbitrate in the agreed place if necessary (although Cintas had that right whether it had reserved it or not). Meckes Decl. Ex. 7 at 22-23 (*Veliz* Dkt. No. 388); Ex. 11 at 1-4, 9 (*Veliz* Dkt. 463). Those approximately 1,900 opt-in plaintiffs who were the subject of Cintas' Motion to Stay and Judge Armstrong's Order thereon are referred to here as the "Stay Motion Plaintiffs."

Faced with Cintas' FAA Section 3 Motion to Stay, which expressly disavowed any reliance in the Northern District Action on FAA Section 4, plaintiffs engaged in a tenacious and time-consuming effort to convince Judge Armstrong that her order compelling arbitration as to the 56 plaintiffs somehow applied to all plaintiffs, including the Stay Motion Plaintiffs, despite

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clear language in the Court's order stating that it applied only to the 56 plaintiffs whom the Court had compelled to arbitrate in its April 5, 2004 Order. *See, e.g.*, Meckes Decl. Ex. 3. Finally, in a February 13, 2006 Order filed on February 14, 2006, the Court granted Cintas' motion and stayed further proceedings by each of the Stay Motion Plaintiffs until each of them had arbitrated their disputes with Cintas "'in accordance with the terms of the agreement' into which such person entered." Meckes Decl. Ex. 16 at 3 (quoting 9 U.S.C. § 3) (*Veliz* Dkt. No. 516). In so doing, the Court incorporated the ruling and reasoning it had stated on the record of the hearings of the motion. *Id.* at 1:25-27. Repeatedly at those hearings, the Court not only stated that the arbitration agreements were enforceable, *see, e.g.,* Meckes Decl. Ex. 13 at 6:22-7:4, but harshly criticized plaintiffs' counsel's tactics of trying to use Section 4 indirectly to invalidate the opt-in plaintiffs' place-of-arbitration terms in their enforceable Arbitration Agreements. Ex. 13 at 25-28; *see also* Meckes Decl. Ex. 12 at 14-16.

The Stay Motion Plaintiffs, however, did not commence arbitrations in accordance with the terms of their agreements. In fact, purporting to represent them, Named Claimants' counsel Michael Rubin indicated at oral argument in the District Court that the Stay Motion Plaintiffs did not intend to arbitrate in the state and county where they last worked for Cintas, by stating that they would instead seek to arbitrate in a single arbitration in San Francisco (before the Honorable Bruce Meyerson) in direct contravention of each of the place-of-arbitration terms in each of their arbitration agreements that the Court had ruled enforceable. Meckes Decl. Ex. 12 at 87:15-18.

Accordingly, and as it had twice expressly reserved the right to do, Cintas filed petitions to compel arbitration under Section 4 of the FAA in the 70 United States District Courts for those Districts encompassing the geographic areas where each Stay Motion Plaintiff had last worked for Cintas.[5] Meckes Decl. ¶ 24. By those petitions, Cintas is currently seeking an order from each such District Court directing each of the Respondents therein (*i.e.*, the same persons who are the Stay Motion Plaintiffs) to arbitrate in that District in accordance with the terms of his or her

[5] An exemplar of the Section 4 Petitions filed by Cintas against each Stay Motion Plaintiff is attached to the Meckes Declaration as Exhibit 20. All of them are identical in text, except for the names of the individual Respondents and local counsel. Meckes Decl. ¶ 25.

arbitration agreement. *Id.* Cintas has served process on some Respondents and is continuing to complete service of process on the remaining Respondents in those Section 4 petition proceedings. *Id.* Accordingly, each of the Stay Motion Plaintiffs is subject to the jurisdiction of the United States District Court for the judicial district where he or she last worked for Cintas.

As discussed more fully below, none of the Stay Motion Plaintiffs are parties to this arbitration. Each Stay Motion Plaintiff, however, is a Respondent in Cintas' Section 4 petition proceedings, which will compel each such individual to arbitrate any remaining claims in the District Court where the petition as to such person was "filed." 9 U.S.C. §4 (emphasis added). Accordingly, because the Stay Motion Plaintiffs are not parties to this arbitration and because questions regarding their arbitration agreements are pending in the District Courts, this Arbitrator has no jurisdiction or authority to make any rulings with respect to those individuals.

C. PROCEEDINGS IN THIS ARBITRATION

Counsel for the Named Claimants submitted their "Demand for Classwide Arbitration Under AAA Employment Rules and Supplementary Rules for Class Arbitration" ("Demand for Arbitration") to the AAA on May 4, 2004. The Demand for Arbitration was presented in letter format and purports to "demand arbitration on a class and/or collective basis of all state and federal claims for overtime compensation and backpay alleged in plaintiffs' First Amended Complaint for Injunctive Relief and Damages" that had been filed in *Veliz v. Cintas Corporation et al.*, Case No. C-03-1180-SBA (N.D. Cal.) ("Veliz"). The First Amended Complaint in the *Veliz* action purported to be incorporated by reference into the Demand for Arbitration. Meckes Decl. Ex. 4.

The Demand for Arbitration states:

> All Claimants bring their claims individually and as a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b), and as a class action under Fed. R. Civ. P. 23(b)(3) and applicable state labor laws, on behalf of current and former Cintas employees (with the exceptions noted above) who worked as Service Sales Representatives, Commission Route Salespersons, Commission Route Sales Representatives, Route Drivers and other persons performing a service and/or delivery function on a non-hourly basis.

The term "Claimants" is defined in Exhibit A to the Demand for Arbitration as "Paul Veliz, James White, Mark Chainuck, Jeff Jay, Tade L. Wasmer, Aaron M. Zadnick, Bobby C. Hodge, Earl C. Woods Jr., Amber Kelly and Sam Williams, on behalf of themselves and all others similarly situated." Given that these are essentially the same named plaintiffs listed in the First Amended Complaint who were compelled to arbitrate, Cintas understands that these are the putative class and FLSA collective representatives in this arbitration.[6] Cintas notes, however, that five other plaintiffs identified as putative class representatives were also compelled to arbitration as part of the group of 56 individually ruled upon by Judge Armstrong: Tom Jaramillo, Mark Fragola, John Cruz, Bryan Cruse and Julian Nazareth. Accordingly, in an exercise of caution and solely for purposes of this Motion, Cintas considers that these five individuals are also putative class representatives. This group of putative class representatives is referred to in this Motion as the "Named Claimants."

Although this arbitration was commenced in May 2004, after the appointment of Arbitrator Meyerson, the AAA held this arbitration in abeyance for almost a year while, as detailed above, plaintiffs made several motions and filed reams of papers in the District Court to extract themselves from arbitration—or at least to attempt to alter the terms of the agreements in their favor.

In letters submitted to the AAA and the Arbitrator, Named Claimants' counsel Michael Rubin has tried to assert that various individuals, including the Stay Motion Plaintiffs, have somehow become "claimants in this arbitration." *See, e.g.*, Meckes Decl. Ex. 14 at 2; Ex. 18 at 2. As stated in Cintas' December 22, 2005 letter in response, the vast majority of those persons have not complied with the AAA requirements for initiating claims against Cintas nor have they somehow "joined" the case—by amendment or otherwise.[7]

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[6] *See, e.g.*, Plaintiffs' First Amended Complaint ¶ 2, which is attached as Exhibit B to the Demand for Arbitration. Meckes Decl. Ex. 4.

[7] A copy of Cintas' December 22, 2005 Letter is attached to the Declaration of Joseph A. Meckes as Exhibit 15 and incorporated herein by reference.

In a telephonic hearing on January 2, 2006, the Arbitrator ruled that claimants had not submitted any motion to amend as required by National Rule 5 such that no persons, other than those specifically identified in the initial Demand for Arbitration, were parties to the arbitration. Meckes Decl. ¶ 18. On March 1, 2006, in another telephonic hearing, the Arbitrator informed claimants' counsel that claimants must move to amend their demand for arbitration if they wished to attempt to join any claimants not previously identified. Meckes Decl. ¶ 20 and Ex.17. When claimants' counsel again, on March 29, 2006, tried to assert that the Stay Motion Plaintiffs were parties to the arbitration, the Arbitrator confirmed by e-mail that the Demand for Arbitration had not been amended to include these individuals—and indeed that the required motion to amend had not been made. Meckes Decl. Ex. 19.

The Arbitrator here does not have the authority or jurisdiction to entertain the claims of any person who wishes to arbitrate in a manner contrary to that required in his or her individual arbitration agreement—including the Named Claimants—whether individually or on behalf of someone else. Moreover, because the Arbitrator has never permitted any additional claimants to join this arbitration, claimants' counsel does not even have a colorable argument that any such individuals have joined this arbitration or are subject to the Arbitrator's jurisdiction. And, as stated above, each of the Stay Motion Plaintiffs are subject to Section 4 Petitions to compel arbitration in 70 District Courts. Section 4 of the FAA dictates that each of those District Courts must compel any arbitrable claims to arbitration in the judicial district where each Section 4 petition was "filed." 9 U.S.C. §4. Accordingly, none of those individuals can purport to "join" this arbitration, and the Arbitrator here has no jurisdiction to entertain any such efforts.

IV. ARGUMENT

A. THE ARBITRATION AGREEMENTS CANNOT BE RULED TO PERMIT ARBITRATION TO PROCEED ON BEHALF OF A CLASS OR COLLECTIVELY

1. Legal Standard In Clause Construction Proceeding

Rule 3 of the Supplemental Rules for Class Arbitration provides the standard for a clause construction proceeding:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.

(emphasis added). Rule 3 dictates that the arbitrator shall determine on the construction of the arbitration clause to determine whether the applicable clause *permits* arbitration to proceed on behalf of a class. Thus, if the arbitration clause does not affirmatively permit class arbitration, the standard is not met and class arbitration cannot proceed.

As the party seeking to show that the Arbitration Agreements permit arbitration to proceed on behalf of a class, the Named Claimants bear the burden of showing that the parties so intended. The United States Supreme Court has recognized that "the general rule [is] that the burden of proof lies on the party asserting the affirmative of a proposition." *United States v. R. Enters., Inc.*, 498 U.S. 292, 305 (1991); s*ee also Burnett Plaza Assocs. v. NCNB Tex. Nat'l Bank*, No. 3:89-CV-1290-X, 1994 U.S. Dist. LEXIS 7781, *54 (N.D. Tex. 1994) (same); *Rex Paper Co. v. Reichhold Chems., Inc.*, 252 F. Supp. 314, 318 (W.D. Mich. 1966) (same); *see generally* 9 WIGMORE ON EVIDENCE, § 2486 (Chadbourn rev. 1981). This is a corollary of the principle that the burden of persuasion should be borne by the party attempting to "change the present state of affairs." MCCORMICK, EVIDENCE § 337 (2d ed. 1972).

This basic principle also applies where, as here, a decision-maker must decide a threshold issue. For example, a party moving to consolidate actions bears the burden of showing that the criteria for consolidation are satisfied. *See In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993); *In re Consolidated Parlodel Litig.*, 182 F.R.D. 441, 444 (D.N.J. 1998); *Schneck v. IBM*, No. 92-4370 (GEB), 1996 U.S. Dist. LEXIS 10126, *3 (D.N.J. Jun. 24, 1996). Similarly, a party seeking to proceed on behalf of a class bears the burden of showing that the action meets the prerequisites for class certification. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *Golden v. City of Columbus*, 404 F.3d 950, 965 (6th Cir. 2005); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 438 F.3d 376, 382 (4th Cir. 2006); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

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Because the Named Claimants are seeking "the affirmative of the proposition" that the Arbitration Agreements "permit arbitration to proceed on behalf of . . . a class," it is the Named Claimants' burden to show that that is what the Arbitration Agreements provide. If, in promulgating Supplemental Rule 3, the AAA had intended to permit class arbitration to proceed unless the party opposing class treatment could show that the agreements forbid class treatment, Supplemental Rule 3 would have been so written. Likewise, if class arbitration were to be permitted where such a right was otherwise provided by statute, such a standard also would have been written into Supplemental Rule 3. Instead, however, the AAA adopted in Supplemental Rule 3 a standard that requires a showing that each of the Arbitration Agreements themselves must "permit" arbitration if there is to be a partial final award allowing the arbitration to proceed on behalf of a class. If such permission is not found *in the agreements,* the agreements do not permit it.

Because the arbitral rules chosen by the parties are incorporated into the arbitration agreement, the Arbitrator lacks authority or jurisdiction to modify the standard set by Supplemental Rule 3 or any other terms of the parties' Arbitration Agreements. As the United States Supreme Court has held, "[a]rbitration under the [FAA] is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). "Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted." *Id.* Because an arbitrator derives his authority from the parties' agreement, he "is confined to interpretation and application of [the parties'] agreement; he does not sit to dispense his own brand of industrial justice." *United Steelworkers of America v. Enter. Wheel & Car Corp.,* 363 U.S. 593, 597 (1960).[8] It would be "inimical to the policies

[8] The laws of the states at issue here are to the same effect: An arbitrator is bound, and his jurisdiction is determined by, the terms of the parties' agreement. *see e.g., Anheuser-Busch, Inc. v. Beer Drivers, Local Union No. 744, Int'l Bhd. of Teamsters*, 280 F.3d 1133, 1141 (7th Cir. 2002) (applying Illinois law); *Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n*, 651 A.2d 1018, 1022 (N.J. 1995); *W. Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 262 (9th Cir. 1992)(applying California law); *Detroit Coil Co. v. Int'l Assoc. of Machinists & Aerospace Workers*, 594 F.2d 575, 580 (6th Cir. 1979) (applying Michigan law); *Int'l Bhd. of Elec. Workers v. Citizens Gas & Coke Utility*, 428 N.E.2d 1320,

underlying state and federal arbitration law [to] force the parties to arbitrate in a manner contrary to their agreement." *Volt*, 489 U.S. at 472.

In reviewing arbitration agreements, the arbitrator generally must apply ordinary state law contract principles. *See Volt,* 489 U.S. at 474 (interpretation of arbitration agreements is "ordinarily a question of state law"). Here, each of the Named Claimant's Arbitration Agreements is governed by the law of the state where he last worked for Cintas and by the FAA. *See, e.g.,* Meckes Decl. Ex. 1 at ¶ 4. Each of the Named Claimants last worked for Cintas in one of the following states: California, Colorado, Connecticut, Illinois, Indiana, Michigan, Missouri, New Jersey, and New York.[9] Thus, in determining whether the Arbitration Agreements permit arbitration to proceed on behalf of a class, the Arbitrator must apply the laws of these states.

2. State Law Standards for Construing Contracts

The arbitrator must seek to ascertain the parties' intentions solely from the language that they used in the agreement if possible. According to California courts, the mutual intent of the parties must, if possible, be inferred "solely from the written provisions of the contract." *Whiteside v. Tenet Healthcare Corp.*, 101 Cal. App. 4th 693, 702 (2002) (citing CAL. CODE CIV. PROC. § 1639). Similarly, in Colorado, Michigan, Missouri, New Jersey, and New York, the plain language of the contract is the place where the arbitrator must look to ascertain the parties' intent. *See Bristol-Myers Squibb Co. v. Ikon Office Sol'ns, Inc.*, 295 F.3d 680, 686 (7th Cir. 2002); *Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211, 1213 (D. Colo. 2005); *Seidel v. Houston Cas. Co.*, 375 F. Supp. 2d 211, 219 (S.D.N.Y. 2005); *Communications Workers of Am. Local 1087 v. Monmouth County Bd. of Social Servs.*, 476 A.2d 777, 782 (N.J. 1984); *Zollman v.*

1326 (Ind. Ct. App. 1981); *Harty v. Cantor Fitzgerald & Co.*, 881 A.2d 139, 150 n.7 (Conn. 2005); *Rockland County Bd. of Coop. Educ. Servs. v. BOCES Staff Ass'n*, 308 A.D.2d 452, 454 (N.Y. App. Div. 2003); *Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032, 1040 (Colo. 1983); *Daniel Constr. Co., Div. of Daniel Int'l Corp. v. Int'l Union of Operating Engineers, Local 513*, 570 F. Supp. 299, 302 (E.D. Mo. 1983).

[9] Paul Veliz and James White last worked for Cintas in California; Mark Chainuck, Jeff Jay, Tade L. Wasmer and Aaron M. Zadnick last worked in Illinois; Amber Kelly and Samuel Williams last worked in New Jersey; Bobby Hodge and Earl Woods, Jr. last worked in Michigan; Mark Fragola last worked in Connecticut; Tom Jaramillo last worked in Colorado; John Cruz last worked in Indiana; Bryan Cruse last worked in Missouri; and Julian Nazareth last worked in New York.

Geneva Leasing Assocs., 780 N.E.2d 387, 393 (Ind. Ct. App. 2002); *Haywood v. Fowler*, 475 N.W.2d 458, 461 (Mich. Ct. App. 1991). Likewise, the laws of Illinois and Connecticut state that "the intent of the parties must be determined solely from the contract's plain language, and extrinsic evidence outside the 'four corners' of the document may not be considered." *Much v. Pac. Mut. Life Ins. Co.*, 266 F.3d 637, 643 (7th Cir. 2001) (applying Illinois law); *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526, 541 (Conn. 2000). "When a court is required to interpret [a] contract, the goal should be to discern and enforce the parties' mutual intent." *Thor Seafood Corp. v. Supply Mgmt. Servs.*, 352 F. Supp. 2d 1128, 1131 (C.D. Cal. 2005). To this end, "[t]he court looks to the objective, outward expression of the contract." *Id.*

In reviewing the contract, the arbitrator's duty "is simply to ascertain and declare what, in terms or in *substance*, is contained therein, and not to insert what has been omitted or omit what has been inserted." *Jensen v. Traders & Gen. Ins. Co.*, 52 Cal. 2d 786, 790 (1959) (emphasis added). California courts will not bind parties to obligations for which the contract is silent. *Chula Vista Police Officers' Assn. v. Cole,* 107 Cal. App. 3d 242, 249 (1980).

In Illinois, there is a "strong presumption" against reading terms into contracts, and courts will *not* "insert a contract term when the agreement itself is silent." *Fix v. Quantum Indus. Ptnrs. LDC,* 374 F.3d 549, 553 (7th Cir. 2004). "If a written contract purports on its face to be a complete expression of the whole agreement, it is to be presumed that the parties introduced into it every material item and term, and in construing it the court will not add thereto another term about which the agreement is silent." *Klefstad v. Am. Cent. Ins. Co.*, 207 F.2d 288, 290 (7th Cir. 1953).

The laws of the other states are no different: the arbitrator may not disregard the parties' intent "to create a new or better contract or to add to, subtract from, modify, or alter any terms of the agreement." *Communications Workers,* 476 A.2d at 782; *see also Bonney v. Citizens' Mut. Auto. Ins. Co.,* 53 N.W.2d 321, 324 (Mich. 1952) (Courts "can neither make a new agreement for the parties nor, by addition, give it a meaning contrary to its express and unambiguous terms."); *Cirrito v. Turner Constr. Co.*, 458 A.2d 678, 680 (Conn. 1983); *In re Marriage of Stokes*, 608 P.2d 824, 829 (Colo. Ct. App. 1979); *Louisville & C. Packet Co. v. Rogers*, 49 N.E. 970, 972 (Ind.

Ct. App. 1898) (Courts cannot "add a new element to the terms of the contract previously made by the parties."). For example, according to New York law, the arbitrator "cannot under the guise of construing a contract add language which the parties could have inserted had they so desired." *Edwards v. State*, 178 N.Y.S.2d 287, 292-93 (N.Y. Ct. Cl. 1958). Similarly, according to Missouri law, it is the arbitrator's "duty…to interpret and enforce [the contract] as the parties themselves have made them." *Hughes v. Toledo Scale & Cash Register Co.*, 86 S.W. 895, 899 (Mo. Ct. App. 1905).

Finally, a "cardinal principle of contract construction" is that a "document should be read to give effect to all of its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995); *see also Trident Ctr. v. Connecticut General Life Ins.*, 847 F.2d 564, 566 (9th Cir. 1988) (Applying California law, "[t]he normal rule of construction, of course, is that courts must interpret contracts, if possible, so as to avoid internal conflict."); *Licciardi v. Kropp Forge Div. Employees' Retirement Plan*, 797 F. Supp. 1375, 1381 (N.D. Ill. 1992) ("In interpreting a contract, it is presumed that all provisions were intended for a purpose, and conflicting provisions will be reconciled if possible so as to give effect to all of the contract's provisions."); *Northwest Bergen County Utils. Auth. v. Midland Park*, 604 A.2d 229, 233 (N.J. Super. Ct. 1992) ("[E]ffect should be given to all parts of the contract and an interpretation or construction which gives reasonable meaning to all of its provisions is preferred to one that leaves a portion of the writing useless or inexplicable."); *Singer v. Goff*, 54 N.W.2d 290, 292 (Mich. 1952) (noting "the cardinal principle which requires us to construe this contract as a whole and give harmonious effect, if possible, to each word and phrase"); *Harseim v. Booth*, 33 N.E. 1016, 1017 (Ind. 1893) ("The writing must be construed as a whole, and effect given to each word and portion, if it can be so construed as to do so."). A contract "is to be interpreted in its entirety to harmonize all of its provisions." *Roberts v. Adams*, 47 P.3d 690, 694 (Colo. Ct. App. 2001); *Merrill Lynch, Pierce, Fenner & Smith v. Adler*, 234 A.D.2d 139, 140 (N.Y. App. Div. 1996); *Dugan v. Grzybowski*, 332 A.2d 97, 100 (Conn. 1973) ("[R]ules of construction . . . dictate giving effect to all the provisions of a contract, construing it as a whole and reconciling its clauses). "[A] construction which entirely neutralizes one provision should not be adopted if the

contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent." *Soukup v. Employers' Liab. Assur. Corp.*, 108 S.W.2d 86, 92 (Mo. 1937).

These are the legal rules that govern this motion. Applying them to the Arbitration Agreements leads to a single conclusion: there is no basis for finding that the agreements "permit" arbitration to proceed on behalf of a class.

3. Language of the Arbitration Agreements Cannot Be Read To Permit Arbitration to Proceed on Behalf of a Class or Collectively

There are no terms in any of the Arbitration Agreements that specifically address class or collective proceedings and no indication in any of the Arbitration Agreements that the parties intended to permit arbitration to proceed on behalf of a class. Under Supplemental Rule 3 the Arbitrator has no discretion to look any place but the terms of the Arbitration Agreements. If the Named Claimants cannot carry their burden of showing that the terms of the Arbitration Agreements "permit arbitration to proceed" on behalf of the class, that is the end of the inquiry.

But there is more. The express written terms in each of the Arbitration Agreements are directly at odds with any inference that the parties intended to permit arbitration to proceed on behalf of a class or collectively. The Arbitrator cannot construe the Arbitration Agreements to permit arbitration to proceed on behalf of a class or collectively without ignoring, invalidating and rewriting many of the Arbitration Agreements' express terms. Because the Arbitrator draws his jurisdiction and authority from the terms of the agreements, and must apply the Arbitration Agreements to give effect to all of their terms, any construction that permits class or collective arbitration is unlawful and exceeds the scope of the Arbitrator's jurisdiction and authority.

a. The Informal Resolution Requirement Shows that Class Proceedings are Not Permitted

One of the terms of the Arbitration Agreements is a requirement that any Cintas employee who has a dispute with Cintas meet with Cintas informally in an effort to resolve the dispute. Both the language of the Arbitration Agreements and basic logic dictate that the Arbitrator would

have to ignore (and thereby invalidate) this threshold requirement if he finds that the Arbitration Agreements permit arbitration to proceed on behalf of a class.

The *first sentence* of each Arbitration Agreement provides that the individual "Employee" signatory must confer in good faith with Cintas before initiating any claim:

> Should any dispute or difference arise between Employee and Employer concerning whether Employer or any agent of Employer ever at any time violated any duty to Employee, right of Employee, law, regulation or public policy or breached this Agreement, Employee and Employer shall confer and attempt in good faith to resolve promptly such dispute or difference.

Meckes Decl. Ex. 1 at ¶ 5. It is only after this effort fails to resolve "such dispute or difference" that the aggrieved Employee is permitted "to pursue Employee's claim" in arbitration. *Id.*

This term demonstrates that the parties did not intend to permit arbitration to proceed on behalf of a class. Under this express term, an employee can only pursue those claims that he or she has attempted in good faith to resolve with Cintas. Given that individual employees have no authority to try to resolve with Cintas the claims of other employees, an individual employee could never "confer and attempt in good faith" to resolve with Cintas claims of others that he or she later purports to assert on behalf of a class.

Moreover, it is only when this good faith attempt fails that the employee is permitted to pursue arbitration of that *individual employee's* claim:

> To have a fair, timely, inexpensive and binding method of resolving any such dispute or difference remaining unresolved after Employee and Employer confer in good faith, should Employee desire to pursue *Employee's claim*, Employee shall . . . submit to Employer a written request to have *such claim, dispute or difference* resolved through impartial arbitration . . . .

Meckes Decl. Ex. 1 at ¶ 5 (emphasis added). Thus, it is only if the employee fails to resolve "Employee's claim" (not the claims of others) that he or she is permitted to resolve that particular employee's own "claim, dispute or difference" through impartial arbitration.

To purport to rule that the Arbitration Agreements permit individual employees to proceed on behalf of a class to pursue the claims of others without first ever attempting to resolve—or having the authority to resolve—the claims the employee purports to assert on behalf of a class

would rob Cintas of one of the fundamental terms of the Arbitration Agreement. As noted above, no states' law permits arbitrators to add terms to, or omit terms from, the parties' agreements. It would be unlawful for the Arbitrator to imply a term permitting class arbitration that would essentially nullify or waive one of the agreement's express terms – particularly a term that is a cornerstone of the parties' agreed dispute resolution regimen. This is something the Arbitrator simply does not have the jurisdiction or authority to do. *United Steelworkers,* 363 U.S. at 597.

b. The Express Place-of-Arbitration Provision Precludes These Plaintiffs From Proceeding with the Collective or Class-wide Arbitration They are Seeking

The Arbitration Agreements each contain an express place-of-arbitration provision requiring that each employee's "claim, dispute or difference [be] resolved through impartial arbitration conducted in accordance with the [National Rules] and held in the county and state where Employee currently works for Employer or most recently worked for Employer." Meckes Decl. Ex. 1 at ¶ 5. Not only does this place-of-arbitration provision expressly preclude the kind of nationwide class or collective arbitration demanded here, it is inconsistent with any intent to permit arbitration to proceed on behalf of a class.

First, it is apparent that permitting these Named Claimants to proceed on behalf of several state-law subclasses and as representatives in a collective action would require the Arbitrator to ignore the parties' agreement regarding the place of arbitration.[10] While it is conceivable that a class or collective arbitration limited to persons proceeding in the state and county where each named claimant in such a proceeding last worked might not violate this provision, the Arbitrator cannot interpret the Arbitration Agreements to permit the Named Plaintiffs or others to proceed collectively or on behalf of putative classes when doing so would directly violate this important contractual term. Accordingly, for this reason alone, the Arbitrator cannot construe the Arbitration Agreements to permit arbitration to proceed on behalf of a class or collectively—or at least not in the manner demanded by the Named Claimants in this arbitration.

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[10] None of the Named Claimants or any other person who they contend has "joined" this Arbitration is permitted to proceed collectively in a single arbitration or to violate the express place-of-arbitration term in his or her Arbitration Agreement.

Second, the place-of-arbitration provision is compelling proof that the parties did not intend to permit arbitration to proceed on behalf of a class or collectively. If the parties had intended to permit class-wide or collective arbitration (particularly the kind of nationwide, multi-state class proceeding the Named Claimants advocate here), each of the individual parties to the separate individual contracts would not have agreed to hold their arbitrations in the state and county where each person last worked. Instead, this provision demonstrates the parties' intent to arbitrate their disputes locally—not the place that is the most convenient and tactically beneficial to claimants' counsel.

c. Enforcement of Each of the Place-of-Arbitration Provisions is Also Necessary for a Fair Proceeding

The express place of arbitration provision is also inextricably intertwined with the contractual requirement that arbitration be "a fair, timely, inexpensive and binding method" of resolving disputes between Cintas and its employees. As a matter of fairness (and contract), Cintas is entitled to the benefit of the place-of-arbitration provision so that it can defend itself in the place where the witnesses and evidence are most likely to be located, *i.e.*, the place where the employee last worked for Cintas. Permitting a consolidated Arbitration would deprive Cintas of the kind of proceeding that the parties agreed was fair – a proceeding in the state and county where each employee last worked for Cintas.[11]

Cintas has and will assert that at least two FLSA exemptions apply in whole or in part to each individual who falls within the proposed class of Service Sales Representatives ("SSRs") that the Named Claimants hope to represent: the Motor Carrier Act exemption ("MCA exemption") and the Outside Sales exemption. Because the facts and circumstances regarding these exemptions will vary widely and will depend on evidence specific to individual Cintas facilities and individual routes at those facilities, Cintas is contractually entitled to arbitrate these

[11] As discussed above, the place-of-arbitration term has been ruled enforceable by Judge Armstrong and, like the other terms of the contract, it cannot be disregarded. The Arbitrator has no jurisdiction to do so. In any event, moreover, forum selection clauses in contracts are presumptively fair and reasonable and are enforced unless the party opposing the chosen forum satisfies a high burden of showing that the inconvenience of proceeding in the chosen forum is unreasonable. *See, e.g., Carter v. Countrywide,* 362 F.3d 294, 299-300 (5th Cir. 2004).

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claims in the agreed place—the place where Cintas will have easy access to the witnesses and documents necessary to prove its defenses. To further understand why Cintas is so adamant about enforcing its place-of-arbitration terms, Cintas provides below a brief summary of Cintas' Rental and First Aid & Safety businesses as well as the two primary FLSA defenses. The legal and factual underpinnings of Cintas' defenses show the degree to which a localized and individualized analysis will be required.

(1) Background on Cintas' Business and Operations

To understand why the express place-of-arbitration provision is essential to a fair proceeding in arbitration, an overview of Cintas Rental and First Aid & Safety businesses is appropriate.[12] Although one of Cintas' product lines is uniforms, neither its business nor the responsibilities of its employees is *uniform* at all. Cintas is a highly diversified company serving a wide variety of customers as diverse as America itself.

While Cintas is involved in several business lines, there are two that are of interest here: the Rental Division and the First Aid and Safety Division ("FAS"). Only these divisions have in the past employed salaried SSRs who might fall within the scope of the class described in the Named Claimants' Demand for Arbitration. Within these business divisions are several hundred individual locations that employ SSRs to service customers and to sell them additional products and services. Each Cintas location is run by a general manager, who is responsible for that location's personnel and for its profits and losses.

Speaking very generally, Rental Division locations rent and sell an enormous variety of uniforms, garments, shoes, mops, mats, towels, linens and paper goods and provide industrial services to business consumers. The managers of each Rental Division location are expected to develop a deep knowledge of their local market and to institute procedures to help Cintas

[12] For additional information regarding the breadth and variety of Cintas' business, see Cintas' corporate website at http://www.cintas.com. Cintas provides the information in this section of the brief as important background and context. Cintas believes the information stated in this section is utterly beyond dispute. To the extent the Arbitrator believes that any of this information should be submitted in the form of written testimony, Cintas hereby offers to provide such written testimony on these points for the Arbitrator's consideration.

capitalize on its diversity and the needs of their particular market. Thus, for example, a manager of a Rental Division location serving greater Detroit would have a different approach to Cintas' business in that market than would a manager located in rural Nebraska. For example, the Detroit location might have a large contingent of heavy industrial customers who wear out garments at a high rate, while the Nebraska location might focus primarily on agriculture or light retail customers whose primary product purchases are mops, mats or towels and who do not wear out uniforms as quickly. Such differences are also present within a particular location, with some routes focused on entirely certain product lines, such as fire retardant clothing or protective attire, while other routes at that same location focusing primarily on facilities supplies. Also, customers' needs will vary by geography, with customers in the northern parts of the United States needing more seasonal products, such as coats, hats, and gloves, than those in western or southern states. Obviously, the responsibilities of SSRs and the products they sell and/or deliver will vary tremendously by route, by industries served by geography.

Cintas' FAS Division is focused primarily on keeping business and industrial companies equipped with the first aid and safety equipment that employees need on a daily basis. This business runs the gamut from ensuring that basic first aid cabinets are well-stocked with medicines and bandages, to installing eye wash stations, to keeping companies stocked with hard hats, work gloves, safety glasses, and even cardiac defibrillators. Again, depending on the geography of the FAS location and the identities and needs of customers in the region, the kinds of products an SSR sells and/or delivers to customers will vary wildly. For example, an SSR serving primarily office buildings might sell a great deal of aspirin but few safety goggles or hardhats. An SSR serving primarily heavy industrial customers might be just the opposite. Like Rental Division locations, the responsibilities of the SSR and the kinds of products they sell will differ substantially between different locations and, indeed, between different SSRs' routes at the same location.

(2) Motor Carrier Act Exemption

The importance of these differences is apparent when one considers the defenses by Cintas in response to any FLSA claim. In her November 4, 2003 Order, Judge Armstrong ruled

that Cintas was entitled to assert defenses to plaintiffs' FLSA claims based on the Motor Carriers Act exemption, 49 U.S.C. §13102(13) ("MCA exemption"). The District Court held:

> [The Motor Carriers Act] applies to Cintas because it is in the business of transporting property such as uniforms for sale, rent or otherwise. It applies to SSRs if they fall under one of four categories, all of which are related to the degree a driver participates in distributing goods in interstate commerce. A driver who spends as little as 3.65 percent of his time performing this duty can fall under the MCA exemption so that the FLSA does not apply to him.

Meckes Decl. Ex. 2 at 7 (*Veliz* Dkt. No. 121).

Under the MCA exemption, an employee who is within the regulatory authority of the Secretary of Transportation is not entitled to be paid for overtime under the FLSA. *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir. 1997). The Secretary of Transportation has jurisdiction, and thus regulatory authority, over employees transporting goods in interstate commerce where the employees are engaging in activities directly affecting the safety of motor vehicles. 49 U.S.C. § 13501; 29 C.F.R. § 782.2. This "interstate commerce" requirement may be satisfied in at least two ways (either of which is sufficient): (1) the carrier is transporting goods across state lines; or (2) the carrier is not transporting goods across state lines, but their transportation is part of a "practical continuity of movement" in the flow of interstate commerce. *Klitzke*, 110 F.3d at 1469; *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217 (2d Cir. 2002).

As Judge Armstrong noted in her November 4, 2003 Order, only a minimal level of interstate activity is required to satisfy the MCA exemption. "It is the *character* of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for the [Secretary's] power." *Peraro ex rel. Castro v. Chemlawn Services Corp.*, 692 F. Supp. 109, 114 (D. Conn. 1988) (emphasis added); *Hutson v. Rent-A-Center, Inc.*, 209 F. Supp. 2d 1353, 1359 (M.D. Ga. 2001) ("A minor involvement in interstate commerce as a regular part of employee's duties…subject[s]…employee to the Department of Transportation" jurisdiction; a person making only two deliveries per week, some intrastate, is exempt). This minimal level has long been recognized by the United States Supreme Court. *Morris v. McComb*, 332 U.S. 422, 431

(1947) (As little as 3.65% of a driver's time spent driving goods that are in interstate commerce is sufficient to satisfy the MCA exemption).

Cintas believes that upon individual analysis, each of the SSRs qualify for the MCA exemption under one or more of the following four tests:

- Drivers who actually cross state lines to make deliveries on their routes are exempt.
- Drivers who drive primarily intrastate but who *may* be required as part of their job duties to cross state lines are exempt. *See Chao v. First Class Coach Co.*, 214 F. Supp. 2d 1263, 1276 (M.D. Fla. 2001) (drivers were exempt where they were expected to be able and available to drive all routes and where any driver could be assigned an interstate route at any time).
- Drivers who are part of the "practical continuity of movement" of goods from the manufacturers or suppliers outside state to customers. *Klitzke*, 110 F.3d at 1470.
- Drivers who actually are subject to DOT regulation, *i.e.*, those who drive trucks with an average gross weight in excess of 10,000 pound in interstate commerce, are exempt under the MCA exemption. *Reich v. American Driver Serv.*, 33 F.3d 1153, 1155 (9th Cir. 1994).

Accordingly, to defend itself against the claim of any SSR, Cintas must present evidence to show that each such SSR asserting claims against Cintas is subject to one or more of these defenses based on facts unique to that SSR. The decision-maker on the merits will have to examine what kind of truck each individual SSR drove, where he or she drove it, and exactly what was on the back of the truck.

(3) Outside Sales Exemption

Just as with the analysis required under the MCA exemption, the Outside Sales exemption turns on factors specific to each individual SSR. The FLSA exempts from its overtime requirements "any employee employed . . . in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). Regulations to the FLSA further define an outside salesperson as:

> [A]ny employee:
>
> (a) who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

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> (1) making sales within the meaning of [§ 213(a)(1)]; or
>
> (2) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (b) Whose hours of work of a nature other than that described in paragraph (a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: *provided, that work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.*

29 C.F.R. § 541.500 (emphasis added). The regulations provide that driver salespersons are exempt where the driver salesperson calls on established customers, delivering goods in prearranged amounts and persuading these customers to accept delivery of increased amounts of goods or of new products, as long as such solicitation is frequent and regular. 29 C.F.R. § 541.505(b), 541.505(f)(2). Work incidental to these sales such as loading the truck, delivering the products sold, and collecting payment is then characterized as exempt work. 29 C.F.R. § 541.505(b).

(4) <u>The Arbitration Agreements Dictate that Cintas Be Allowed to Prove its FLSA and State Law Overtime Exemptions in Local Arbitrations</u>

As is apparent from the standards to be applied and the rulings already made by Judge Armstrong, Cintas' defenses to the proposed class members' FLSA claims will require an individualized determination as to whether each is subject to either the MCA exemption or the Outside Sales exemption or both. Because such an individualized determination is necessary, those claims can be most efficiently and fairly resolved, as is in any event required by the Arbitration Agreements, only in a place near where an employee worked for Cintas. For example, in showing that a particular proposed class member was properly characterized as exempt under the MCA exemption, Cintas may be called on to show that that a common job duty at that person's particular Cintas facility was that SSRs be ready to transport goods across state lines if necessary. Of course, this will require testimony of live witnesses for each such individual or at least for each location where such individual worked. Similarly, to show that goods delivered by a proposed class member were in the practical continuity of interstate

commerce, Cintas may need to put on testimony of the managers, stockroom clerks or others from each specific Cintas location to show the methodology used by each location in the management of inventory and the handling of products relating to each specific SSR's route.

Similarly, in determining whether a particular SSR is subject to the Outside Sales Exemption, the arbitrator will need to understand how SSRs at a particular location were trained, how they were supervised and what sales goals they were individually expected to meet over a particular period of time. Likewise, because Cintas locations serve different kinds of businesses, with different kinds of products in geographically diverse regions, Cintas will be required to present testimony that is at least specific to particular employees and locations to show how those employees and SSRs generally from those locations perform their job duties. Again, these issues will require live witnesses—witnesses who will be difficult to bring to a remote location and, given time factors, even more difficult to present in a consolidated proceeding.

Cintas notes that Arbitrator Meyerson has stated in the different contexts of other proceedings his belief in those other cases that collective and/or class arbitration can be more "efficient and cost effective" than individual proceedings.[13] An arbitrator, however, is not entitled to ignore the contractually mandated terms in the case before him because he or she believes a different proceeding would be more efficient. And, in any event, given the stakes involved in a class or collective arbitration, time-consuming judicial review of interim awards and the substantial notice requirements mandated by the Supplemental Rules, a single nation-wide collective or class arbitration may actually take far longer and may be far more costly than if aggrieved individuals seek to resolve their disputes with Cintas individually and locally in accordance with the terms of each of the Arbitration Agreements.[14]

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[13] Cintas notes that Arbitrator Meyerson in *Smith and TeleTech Customer Care Management*, AAA Case No. 11 160 02726 04, relying on language in the arbitration agreement suggesting that arbitration be administered in order to be efficient and cost-effective, found that the parties intended to allow FLSA collective and class arbitration to proceed. Applying any such sentiment here to invalidate the express terms of the each of the parties' agreements, however, would be unlawful and would exceed the Arbitrator's jurisdiction and authority.

[14] Indeed, if any allegedly aggrieved claimants had initiated arbitration individually at the time the District Court action was filed almost three years ago, Cintas believes those claims would

Besides a timely and inexpensive proceeding, Cintas is contractually entitled to a fair proceeding, which, under the terms of the Arbitration Agreements, includes arbitration in the county and state where each individual claimant last worked for Cintas. Where the parties have agreed on a term that is presumptively fair, the Arbitrator is not authorized to sacrifice an element of that agreement simply to promote his perception of efficiencies in class or collective arbitration—that probably do not even exist in the context of this matter.

d. Parties' Intent to Proceed Individually Evidenced by Contractual Limitations Period and Maximum Filing Fees

The parties' intent to proceed in arbitration individually is also shown by the Arbitration Agreements' one-year limitations period and its cap on the filing fees to be borne by individual claimants. If the parties had intended to permit arbitration to proceed on behalf of a class, they would not have included either of these provisions.

The contractual one-year limitations period strongly implies that the parties intended only that the "Employee's" individual claims (and not those of others) are subject to arbitration.[15] Under this provision, an employee wishing to arbitrate with Cintas "shall, within one year of the date when the dispute or difference first arose or within one year of when Employee's employment ends, whichever occurs first," submit a request to have "such claim" resolved through arbitration. Meckes Decl. Ex. 1 ¶ 5. This language implies that only the claims of the individual employee (*i.e.*, those claims he or she could not resolve informally with Cintas) may be initiated within the one-year period. If the parties had intended to permit the arbitration to proceed on behalf of a class, it would be nonsensical to tie the date the arbitration is to be

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have been resolved long ago. It is only Claimants' counsel's strategic desire for class proceedings that has resulted in all of the delays to date. Judge Armstrong harshly criticized plaintiffs' counsel on the record for requiring extensive court proceedings in seeking to obtain a tactical advantage in arbitration in direct violation of each of the Stay Motion Plaintiffs' Arbitration Agreements. *See* Transcript of Proceedings, October 27, 2005 at 25-28, which is included with the Meckes Decl. as Ex. 13.

[15] As noted above, Judge Armstrong severed the one-year limitations period for plaintiffs who last worked for Cintas only in the places located in the Second, Fourth, Fifth, Sixth, Ninth and Tenth Circuits. This however, is irrelevant to the parties' intent in agreeing to arbitrate.

submitted to the date a putative class representative's claim arose or the date that the putative representative ceased his or her employment. Otherwise, an individual who had left the company or whose claims had arisen years before could initiate arbitration if the claim of at least one class member had arisen within the previous year. It defies logic that that is what the parties intended by this provision.

The parties' intent to allow only individual arbitration is further evidenced by the express limitation in the agreement that the "Employee's initial share of the arbitration filing fee shall not exceed one day's pay or $100, whichever is less." If the parties had intended to permit arbitration to proceed on behalf of a class or collectively in the manner demanded by the Named Claimants, this provision would not refer to "employee's initial share" in the singular. If the parties had intended to permit class or collective arbitration they undoubtedly would have stated whether this $100 fee is to be borne by each participant in the collective action or allocated among participants.

4. No Terms In Arbitration Agreements Imply or Suggest that Class or Collective Arbitration is Permitted

While there are many terms of the Arbitration Agreements that defy any intention to permit class or collective arbitration, there is no language suggesting that class or collective arbitration might be permitted. Under Supplemental Rule 3, the absence of any contract terms that can be construed to permit arbitration to proceed on behalf of a class should end the inquiry.

Cintas notes, however, that in *Sidhu and GMRI and Darden Restaurants,* AAA Case No. 11 160 02273 04 and in *Smith and Teletech Customer Care Management,* AAA Case No. 11 160 02726 04, it appears that Arbitrator Meyerson interpreted arguably silent arbitration agreements to permit class arbitration based on reasoning that would defy rulings already made by Judge Armstrong in this matter. To the extent *Sidhu* or *Smith* assumes that class and/or collective arbitration is available in arbitration unless the parties specifically prohibit it, or to the extent that

it assumes that class proceedings are necessary for claimants in arbitration to vindicate statutory rights, the reasoning underpinning those decisions has no place here.[16]

a. Arbitrator Meyerson's Decisions in *Sidhu* and *Smith*

In both *Smith* and *Sidhu*, it appears that Arbitrator Meyerson held that agreements that are apparently silent on the question of class or collective arbitration permit class or collective arbitration unless specifically prohibited. Not only was Arbitrator Meyerson's reasoning in these cases contrary to the standard set in Supplemental Rule 3 and legally flawed, those decisions are directly at odds with rulings in this matter by Judge Armstrong–rulings that are binding in this proceeding under Supplemental Rule 1(c).

In holding that collective and class arbitration was permitted in *Smith,* Arbitrator Meyerson did not point to any terms that could be construed to permit class or collective arbitration, which is the standard under Supplemental Rule 3 and applicable law. Instead, Arbitrator Meyerson reasoned that the parties' silence is not dispositive because "under the FLSA, the right to bring a collective action derives from federal law, not from any understanding or agreement of the parties."[17] *Smith* at 2.

In *Sidhu*, on the other hand, Arbitrator Meyerson pointed to two contractual provisions which he said created an ambiguity as to whether class proceedings were permitted. *Sidhu* at 2. First, Arbitrator Meyerson noted that the relevant arbitration agreement "applies to the '**claims** of **Employees** . . . for wages or the compensation due.'" *Id.* (Emphasis in original). Second, Arbitrator Meyerson pointed to broad grants of arbitral authority in the relevant arbitration

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[16] Cintas notes that decisions of arbitrators – including those of Arbitrator Meyerson – have no precedential value. Cintas addresses the previous decisions of Arbitrator Meyerson so that, respectfully, errors in those decisions, or reasoning in those decisions that is inconsistent with Judge Armstrong's rulings, will not be repeated here. That said, Cintas also notes that all of the underlying arguments, briefs and/or other papers from those cases are not available. So perhaps there were other, unarticulated factors involved in those cases that would be known to Arbitrator Meyerson but not to counsel in this case.

[17] But, as Judge Armstrong has ruled, applying multiple precedents from the United States Supreme Court and the federal Courts of Appeals, an individual "forfeits any procedural rights arising from the FLSA, while retaining her substantive rights (e.g., the right to obtain substantive relief) in arbitration." In so ruling, the Court held there was no substantive right to class proceedings in arbitration. Meckes Decl. Ex. 8 at 4-6 (*Veliz* Dkt. No. 426).

agreements and in the National Rules that gave the arbitrator permission to "grant the same 'legal and equitable relief . . . as could a court of competent jurisdiction.'" *Id.* From these terms, Arbitrator Meyers reasoned that one could "infer that a class arbitration is permitted." *Id.*

In both *Sidhu* and *Smith,* Arbitrator Meyerson found the parties' silence with respect to class arbitration to be insignificant because, "[i]n the absence of arbitration, where an employee is employed pursuant to ordinary company rules, such rules (*e.g.*, a personnel handbook or manual) would not expressly authorize an employee to file a class action." *Sidhu* at 2 n.1; *Smith* at 2. Thus, Arbitrator Meyerson reasoned that the parties' silence in their agreements "does not demonstrate that it was the intent of the parties to *prohibit class arbitration.*" *Sidhu* at 2; *Smith* at 2 (emphasis added).

Also, in both *Smith* and *Sidhu,* Arbitrator Meyerson also relied on the Supreme Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991), to imply that class arbitration is required if arbitration is to be a suitable substitute for litigation. *Smith* at 2; *Sidhu* at 3. In both cases, Arbitrator Meyerson reasoned that, under *Gilmer,* the arbitral forum is inadequate for claimants to vindicate their statutory rights unless the class mechanism is available.

In these rulings, it appears that Arbitrator Meyerson misconstrued the standard set by Supplemental Rule 3 to hold that, unless arbitration is prohibited, it is permitted. Nothing in Supplemental Rule 3 gives the arbitrator any authority to determine whether arbitration is otherwise permitted by something other than the agreement (*e.g.*, by the FLSA). If the Arbitrator reasons that claimants bring into the arbitral forum some "right" to class proceedings, the Arbitrator impermissibly adds terms to the parties' agreement. In this case, such a ruling is precluded by the District Court's binding rulings on these issues. Because Supplemental Rule 1(c) dictates that the Court's orders control, as explained in more depth below, the Arbitrator here cannot deviate from them to reach a contrary result.

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b. Because Arbitrators Are Prohibited From Inserting Terms into the Parties' Agreement, an Arbitrator Cannot Permit Class Arbitration Unless the Parties So Intended

To the extent Arbitrator Meyerson's Clause Construction awards in *Smith* and *Sidhu* hold that the parties' silence in their agreements as to class arbitration can be read to permit arbitration to proceed on behalf of a class, those decisions are incorrect. As discussed above, the laws of the relevant states uniformly prohibit courts or arbitrators from re-writing contracts to insert terms. For the arbitrator to permit class or collective arbitration in this case—particularly where doing so would result in the wholesale disregard and invalidation of other terms—would run contrary to the parties' intent and would exceed the Arbitrator's contractual authority.

Under similar circumstances, the Los Angeles County Superior Court in *DirecTV v. Cable Connection, Inc. et al.,* Case No. BS095987, recently rejected an arbitral panel's decision allowing class arbitration to proceed where there was no evidence of an intention to permit or prohibit class arbitration.[18] In the only court order published by the AAA on its Class Action Docket as reviewing a Clause Construction Award, the Superior Court rejected the arbitral panel's reasoning that either silence in the arbitration agreement or the fact that class actions are generally available in court gave the panel the authority to interpret the agreements to permit class arbitration. *Id.* at 2.

The court ruled that the "threshold question" for the panel to decide under the Supplemental Rules is "whether the parties agreed to class-wide arbitration." *DirecTV* at 4. Where the agreement is silent and does not evidence any intent one way or the other regarding the treatment of class claims, arbitrators simply "do not have the authority to add a procedure for which the contract did not provide." *Id.* at 3. Because arbitrators derive their authority from and are bound by the terms of the arbitration agreement, for an arbitrator to construe an agreement to permit class arbitration without any evidence that the parties so intended is "essentially [to add] a

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[18] The underlying arbitration is captioned *Cable Connection et al. and DirecTV,* AAA Case No. 11 145 00752 04. Copies of the Los Angeles County Superior Court order vacating the panel's partial award, along with a copy of the award submitted to the court for review are attached to the Declaration of Joseph A. Meckes at Exhibits 21 and 22.

term to the contract, " *Id.* at 5 (citing *United Steelworkers*, 363 U.S. at 597) ("[A]n arbitrator is confined to interpretation and application of the [governing] agreement; he does not sit to dispense his own brand of industrial justice.").

DirecTV's reasoning is equally applicable here. Simply because the class or collective mechanism is available in court does not give the arbitrator the authority to import it into arbitration. Unless the parties agreed to permit class arbitration, they are not permitted. Where an arbitrator inserts such a term in the absence of any intent to permit class or collective proceedings, the arbitrator exceeds the contractual bounds of his jurisdiction and authority.

c. The District Court has Held that Class Arbitration is Not Necessary for Plaintiffs to Vindicate their Statutory Rights

Not only are the basic foundations of Arbitrator Meyerson's decisions in *Smith* and *Sidhu* eliminated by *DirecTV,* both of those decisions rely on the erroneous assumptions that class arbitration is necessary for the arbitral forum to be a "suitable substitute" for litigation, and that the class mechanism is somehow imported into the arbitral forum by operation of law. Not only are these assumptions legally incorrect, they are directly contrary to a ruling already issued by Judge Armstrong that is binding in this matter.

In *Sidhu*, Arbitrator Meyerson wrote:

> [T]his result is consistent with the requirements of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) in which the United States Supreme Court held that for arbitration to be a suitable substitute for litigation with respect to the protection of statutory employment rights, arbitration must provide employees with a forum that permits them to effectively vindicate their cause of action in the arbitral forum.

Sidhu at 3; *see also Smith* at 2. While Arbitrator Meyerson was correct that the arbitral forum must be a suitable substitute for litigation, Judge Armstrong has held in this matter that even the complete inability to proceed collectively or as a class in arbitration does not make the arbitral forum a less suitable substitute for litigation. Ruling on a motion brought by the Named Claimants, Judge Armstrong held that the class procedure is not necessary for plaintiffs to vindicate their rights in an arbitral forum. Meckes Decl. Ex. 8 at 4-6 (*Veliz* Dkt. No. 426).

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Judge Armstrong relied on United States Supreme Court precedent in *Gilmer* (as well as several circuit court opinions) and reached the diametrically different conclusion from that reached by Arbitrator Meyerson in *Smith* and *Sidhu*. *Id.* Faced with higher costs than they had anticipated to arbitrate a class proceeding, 56 plaintiffs—including Named Claimants here—had sought reconsideration of the Court's order compelling them to arbitration on the grounds that the plaintiffs would be unable to vindicate their statutory FLSA rights in arbitration because the costs of arbitration would preclude them from pursuing their claims on a class or collective basis—even though individual claimants could proceed with individual arbitrations for approximately $100 each. *Id.*

Judge Armstrong, however, directly rejected the idea that class or collective proceedings in arbitration were necessary for the arbitration to be a suitable substitute for arbitration. *Id.* Judge Armstrong held that even the "complete inability to pursue arbitration on a class or collective basis" does not "impact a plaintiff's ability to vindicate his or her statutory rights" in arbitration if the plaintiff has access individually to an arbitral forum. *Id.* at 6.

In *Smith,* Arbitrator Meyerson went beyond the terms of the parties' agreement to hold that the right to collective proceedings is found not in the parties' agreement but in procedural rights provided to claimants by the FLSA. *Smith* at 2. In so ruling, Arbitrator Meyerson did not construe the parties' *agreements* to determine whether the *agreements* permitted arbitration to proceed on behalf of a class or collectively. Instead, Arbitrator Meyerson assumed that the claimants carried with them into arbitration a right to proceed collectively. Thus, it appears that Arbitrator Meyerson misconstrued Supplemental Rule 3 to require proof that a collective action was *prohibited*, not whether a class proceeding was *permitted* as required under Supplemental Rule 3.

More importantly, however, Arbitrator Meyerson's decision in *Smith* is directly at odds with Judge Armstrong's ruling based on well established jurisprudence that claimants in arbitration *do not* carry with them procedural rights from litigation into the arbitral forum. Relying on *Kuehner v. Dickinson & Co.,* 84 F.3d 316, 320 (9th Cir. 1996), Judge Armstrong held "that when an employee agrees to arbitrate, she forfeits *any* procedural rights arising from the

FLSA, while retaining her substantive rights (*e.g.*, the right to obtain substantive relief) in arbitration." Meckes Decl. Ex. 8 at 6 (*Veliz* Dkt. No. 426) (emphasis added). In so ruling, Judge Armstrong stated that the availability of class or collective proceedings is not among the basic procedural and remedial protections required for claimants to pursue and vindicate their statutory rights. *Id.* at 6 n.3.

Because Judge Armstrong has, by Order, addressed and resolved these issues, the Arbitrator has no discretion under Supplemental Rule 1(c) to deviate from the Court's rulings as he considers whether the Arbitration Agreements permit arbitration to proceed on behalf of a class or collectively.

d. Language of National Rule 34(d) and the Arbitration Agreements is Not Amenable to Construction Permitting Class Arbitration

In *Sidhu*, Arbitrator Meyerson wrote that the parties' broad grant of authority to the arbitrator to grant the same "legal and equitable relief . . . as could a court of law," along with their incorporation of the National Rules (in particular National Rule 34(d)) created an ambiguity as to whether the parties intended to permit class arbitration. *Sidhu* at 2. This reasoning cannot be applied here. Neither the language of the Arbitration Agreements here nor the language of National Rule 34(d) can be read to create any kind of "ambiguity" as to whether the parties intended to permit class arbitration.

First, the notion that the class mechanism is a "remedy or relief" that is available in arbitration is inconsistent with Judge Armstrong's previous rulings in this case as well as the black letter principle of law that there is no substantive right to the class procedure.[19] As Judge

[19] Federal procedural laws are not incorporated into the parties' arbitration agreement and do not apply in the arbitral forum. *See Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 267-68 (2d Cir. 1999) (" The federal rules do not govern the procedure in the hearings before the arbitrators."); *Pike v. Freeman,* 266 F.3d 78, 92 n.17 (2d Cir. 2001) ("[T]he Federal Rules of Civil Procedure do not apply in arbitrations before the American Arbitration Association."); *see also Schlessinger v. Rosenfeld, Meyer & Susman,* 40 Cal. App. 4th 1096, 1108 (1995) (As a "general proposition . . . rules of civil procedure . . . do not apply in arbitration proceedings."). "By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights . . . in favor of arbitration 'with all of its well known advantages and drawbacks.'" *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier,* 508 F.2d 969, 975 (2d Cir. 1974).

Armstrong stated: "So long as a plaintiff can pursue the substantive statutory right through arbitration, a plaintiff's inability to proceed collectively or on behalf of a class is legally irrelevant." Meckes Decl. Ex. 8 at 5 (*Veliz* Dkt. No. 426). Likewise, citing *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996), Judge Armstrong held that "when an employee agrees to arbitrate, she forfeits any procedural rights arising from the FLSA, while retaining her substantive rights (*e.g.*, the right to obtain substantive relief) in arbitration." *Id.* at 6 (emphasis added).

In fact, the idea that the term "remedy or relief" can somehow be interpreted to include the class procedure or some "right" to proceed collectively is at odds with the very essence of the law of remedies. In his treatise, Professor Dobbs states:

> The law of remedies is . . . sharply distinguished from the substantive law of rights. It is also distinguished from the law of procedure. Procedural law deals with the process of getting from right to remedy. Getting there is the important thing for the law of procedure.
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> . . .
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> Judicial remedies usually fall in one of four major categories: (1) damages remedies; (2) restitutionary remedies; (3) coercive remedies such as injunction; or (4) declaratory remedies.

DAN B. DOBBS, LAW OF REMEDIES, § 1.1 (1993).[20] A "remedy" or "relief" is thus the manner in which a tribunal vindicates a claimant's substantive rights, not the process by which that vindication is achieved.

This is consistent with *Carter v. Countrywide*, 189 F. Supp. 2d 606, 618-19 (N.D. Tex. 2002), *aff'd* 362 F.3d 294 (5th Cir. 2004), where the court held that the term "remedies and relief" in the NAF arbitral rules meant "remedies and relief" as described by Professor Dobbs, such as damages, attorneys' fees and the like. *Id.* At the same time, the court held that procedural rights, such as the class mechanism or the right to discovery, are *not* imported into the arbitral forum. *Id.*

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[20] In the 1972 edition of Professor Dobbs' treatise, he states the difference as follows: "The law of judicial remedies concerns itself with the nature and scope of the relief to be given a plaintiff once he has followed appropriate procedure in court and has established a substantive right. The law of remedies is thus sharply distinguished from the law of substance and procedure." DAN B. DOBBS, THE LAW OF REMEDIES (1972).

The Arbitrator cannot, therefore, confuse the availability of the class mechanism in arbitration with a "remedy or relief" that is available in Court to somehow create an ambiguity that does not exist. Having a class mechanism is not the vindication of any substantive rights, but rather is "provided only as a means to enforce substantive law." *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 462 (1974). There is nothing "remedial" about the class procedure—it does not cure any injury, does not prevent any harm and does not punish a wrongdoer. The Named Claimants surely would not consider that they have obtained a "remedy" or "relief" in this arbitration if the best they could achieve is to proceed on behalf of a class. To consider the class mechanism to be a "remedy" or that it somehow provides "relief" to any claimant "would be to confuse the means with the ends -- to sacrifice the goal for the going." *City of San Jose*, 12 Cal. 3d at 462.

Moreover, if the class mechanism is incorporated into arbitration under the rubric of a "remedy or relief," then all other procedural rules and variations that might be available in court for discovery, for admission of evidence, for jury trials, etc. would have to be incorporated into arbitration as well. Obviously, this is not what the parties intended since such a proceeding would have none of the benefits of arbitration, but all of its procedural burdens. As the United States Supreme Court held in *Gilmer,* "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31. If the Arbitrator construes the term "remedy or relief" to include the class mechanism—or any courtroom procedure—he is doing nothing more than rewriting each agreement.

That the parties here did not intend the term "remedy or relief" to include courtroom procedures is further shown by the language used in the Arbitration Agreements themselves: "The arbitrator shall have the power to award appropriate relief, including damages, costs and attorney's fees as available under relevant laws . . . ." Meckes Decl. Ex. 1 at ¶ 5. Under the legal maxim *ejusdem generis,* general terms followed by more specific references are interpreted to include only the "persons or things of the same general kind or class as those specifically mentioned." *Cahill v. Liberty Mut. Ins. Co.* 80 F.3d 336, 338 n.2 (9th Cir. 1996); *Save Our Little*

Vermillion Env't v. Illinois Cement Co., 725 N.E.2d 386, 390 (Ill. App. Ct. 2000); *Hawkins v. Great W. R. R. Co.*, 17 Mich. 57, 63 (1868); *Abeles v. Adams Eng'g Co.*, 165 A.2d 555, 560 (N.J. App. Div. 1960); *Jewel Tea Co. v. Watkins,* 145 P. 719, 721 (Colo. Ct. App. 1914); *Scullin Steel Co. v. Mississippi Valley Iron Co.*, 273 S.W. 95, 97 (Mo. 1925); *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l*, 643 N.E.2d 504, 508 (N.Y. 1994); *24 Leggett St. Ltd. Pshp. v. Beacon Indus.*, 685 A.2d 305, 313 (Conn. 1996); *see also* 5 CORBIN ON CONTRACTS §24.28 (Matthew Bender 2005) ("meaning of the general term in a contract is limited by accompanying specific illustrations"). Here, applying *ejusdem generis,* the general term "appropriate relief" can only be interpreted to include remedies such as "damages, costs and attorneys' fees," not procedures like class actions—or any other procedures—that might otherwise be available in litigation.

Accordingly, it would be unlawful for the Arbitrator to rule that the terms "remedy" or "relief" create an ambiguity as to whether the parties intended to permit class arbitration. These terms have a clear, legal meaning that is simply not subject to such a strained interpretation.

B. THE ARBITRATION AGREEMENTS DO NOT PERMIT CONSOLIDATION OF THE CLAIMANT'S INDIVIDUAL CLAIMS

The Arbitration Agreements also do not permit the Named Claimants as *individuals* to consolidate their claims—amongst themselves or with anyone else.[21] As explained above, each Named Claimant is subject to an enforceable place-of-arbitration provision that requires him or her to arbitrate in the state and county where he or she last worked for Cintas—here, this is ten different counties in nine different states. Second, the language of the Arbitration Agreements does not permit any inference that the parties intended to allow consolidation of the individual disputes between each Named Claimant and Cintas. Finally, allowing the Named Claimants to proceed on a consolidated basis would cause Cintas to suffer prejudice. Because allowing these Named Plaintiffs to join their claims is contrary to the Arbitration Agreements and the National Rules, the Arbitrator does not have the jurisdiction or authority to permit consolidation.

[21] Cintas notes that the Demand for Arbitration states that the Named Claimants bring their claims both individually and on behalf of the putative class of similarly situated individuals. Meckes Decl. Ex. 4.

1. Arbitrations Between Cintas and Each Named Claimant is Required to Be Held in the State and County Where Each Named Claimant Last Worked for Cintas

The Arbitration Agreements are unambiguous. If an employee is unable to resolve his or her dispute with Cintas informally, he or she must submit a request for arbitration "to be held in the county and state where Employee currently works for Employer or most recently worked for Employer." *See, e.g.*, Meckes Decl. Ex. 1 at ¶ 5. Rule 9 of the National Rules further confirms that such place-of-arbitration provisions are binding: "The parties may designate the location of the arbitration by mutual agreement." It is only "in the absence of such agreement," that the AAA has any authority itself to fix the place of arbitration or that the Arbitrator has any authority to resolve disputes regarding the place of arbitration. *Id.*

The Named Claimants in this arbitration cannot join their claims to proceed collectively because they are required to arbitrate their disputes with Cintas in the ten different counties in the nine different states across the country where they last worked for Cintas. Claimant Veliz last worked for Cintas in Los Angeles County California; claimant White last worked in San Bernardino County California; claimant Jaramillo last worked in Denver County, Colorado; claimant Fragola last worked in New Haven County, Connecticut; claimants Chainuck, Wasmer and Zadnick last worked in Will County, Illinois; claimant Jay last worked in Cook County, Illinois; claimant Cruz last worked in Marion County, Indiana; claimants Hodge and Woods last worked in Genessee County, Michigan; claimant Cruse last worked in Greene County, Missouri; and claimants Kelly and Williams last worked in Middlesex County, New Jersey. *See* Meckes Decl. Ex. 4 at Ex. B ¶¶ 8-12, 15-21, 24, 26, 27).

Cintas anticipates that the Named Claimants will argue that they are somehow entitled to proceed collectively in a single arbitration because Judge Armstrong compelled them to arbitrate in the Northern District of California. *See* Meckes Decl. Ex. 8 at 11-13 (*Veliz* Dkt. No. 426). Nothing in the Court's Order, however, suggests that it conferred upon these claimants any *right* to arbitrate in the Northern District of California or to arbitrate collectively. Instead, the Court simply recognized that its power to compel arbitration was limited by Section 4 of the FAA to the judicial district in which it sits. The Court wrote that "to the extent that the arbitration

agreements of the 56 plaintiffs compelled to arbitrate by the April 5, 2004 Order require arbitration to proceed outside of this judicial district, *the Court* cannot enforce those provisions." *Id.* at 13 (emphasis added).

The Court recognized, however, that compelling the Named Claimants to arbitrate in the Northern District of California did *not* render their place-of-arbitration agreements unenforceable by Cintas. The Court wrote:

> Plaintiffs did not assert that the place-of-arbitration provisions of the arbitration agreements were unenforceable in briefing on Defendants Motion to Compel Arbitration, nor did Plaintiffs raise it as a grounds for relief in its Motion for Reconsideration pursuant to Civ. L.R. 7-9. Accordingly, to the extent plaintiffs argue that these provisions are unfair, they have waived those arguments.

Id. at 12 n.8. If the Court had considered its Order compelling arbitration to render the Named Claimants' place-of-arbitration provisions unenforceable by Cintas, it would not have concluded that the Named Claimants had waived any arguments that those provisions were unfair, since the point would have been moot.

The only reasonable interpretation of the Court's May 4, 2005 Order is that that Order required the Named Claimants to arbitrate in the Northern District of California but did not limit Cintas' right to enforce the place-of-arbitration provision if it chose to do so. This would be the natural outcome of a motion to compel arbitration made by Cintas to those 56 plaintiffs. To the extent the Court ordered 56 plaintiffs to arbitrate in the Northern District of California, the Court eliminated any right the Named Claimants might have had to arbitrate elsewhere. Thus, as the moving party, any right to require that arbitration take place in the Northern District of California belongs to Cintas alone, and is therefore, Cintas' right to enforce—or to waive—as it sees fit. By initiating the lawsuit in the Northern District of California, the Named Claimants put themselves into a position of being compelled to arbitrate here—thereby giving up any right they might have had to arbitrate in the counties where they last worked for Cintas. But, by moving to compel arbitration under Section 4, Cintas could not be said to have waived any right to enforce the place-of-arbitration provision—particularly given the requirement under Section 4 that the arbitration agreements be enforced according to their terms. 9 U.S.C. § 4.

Throughout this arbitration, Cintas has been steadfast in its position that the express place-of-arbitration terms in the Arbitration Agreements must be enforced. Given that the express place-of-arbitration provisions prevent this arbitration (as posited by the Named Claimants) from proceeding any further, the Arbitrator must enforce the terms of their Arbitration Agreements.

2. The Arbitrator Cannot Consolidate Arbitration Proceedings Where the Separate Arbitration Agreements are Silent on the Issue of Consolidation

Beyond the fact that the express place-of-arbitration provisions bar the Named Claimants from consolidating their claims, a majority of courts have held that "the sole question" when determining whether consolidation is permitted "is whether there is a written agreement among the parties providing for consolidated arbitration." *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (citing *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984)). "[C]onsolidation is improper [where] the terms of the [arbitration] agreements [do] not provide for it." *Id.* at 149; *see also Gov't of U.K. of Gr. Brit. v. Boeing Co.*, 998 F.2d 68, 70 (2d Cir. 1993); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 283 (11th Cir. 1989). As noted above, these authorities are consistent with Supplemental Rule 3, which puts the burden on the party seeking class arbitration to show that the agreements permit it.

Here, each Named Claimant (and each member of any classes they purport to represent) signed separate employment agreements with Cintas, which include their own separate arbitration provisions. Where arbitration agreements are silent, this is sufficient in and of itself to prevent the Arbitrator from consolidating what should be separate individual arbitration proceedings into one proceeding. *See Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 727 (7th Cir. 2004) ("[A]rbitration claims of multiple parties cannot be consolidated."). And, "where there [are] separate arbitration agreements with different parties signing each agreement," the Arbitrator should not find the parties implicitly consented to consolidated arbitration. *Rolls-Royce Indus. Power, Inc. v. Zurn EPC Servs.*, No. 01 C 5608, 2001 U.S. Dist. LEXIS 18278, * 14 (N.D. Ill. Nov. 6, 2001). Even if the Arbitrator believes that consolidation will be more efficient, he "is not permitted to interfere with private arbitration [agreements] in order to impose [his] own view of

speed and economy." *See Boeing*, 998 F.2d at 70, 73. "This is the case even where the result would be the possibly inefficient maintenance of separate proceedings." *Id.* at 73.

Here, as discussed above, the express place-of-arbitration provision plainly dictates that consolidation cannot be permitted. But even if the Arbitration Agreements were silent on this issue, however, the Arbitrator could not interpret that silence as the parties' consent to consolidation.

3. The Arbitrator Cannot Invalidate the Terms of the Parties' Arbitration Agreement to Consolidate Multiple Arbitration Proceedings

A minority of courts have held that a consolidation is appropriate where the agreement is silent—but only when consolidation does not "contradict[] the contractual terms regarding arbitration." *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988). Such consolidation is permitted only "when the language of the arbitration clause is broad and in no way suggests limits on the subjects or the parties to the agreed-upon arbitration." *Id.*[22]

Where, as here, the parties have agreed to an express place-of-arbitration term, the courts have refused to order consolidation where doing so would nullify that term. *See, e.g., Seguro de Servicio de Salud v. McAuto Systems Group, Inc.*, 878 F.2d 5, 10 (1st Cir. 1989); *Painewebber, Inc. v. Fowler*, 791 F. Supp. 821, 825 (D. Kan. 1992); *Hyundai Am. v. Meissner & Wurst GmbH*

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[22] In *New England Energy, Inc. v. Keystone Shipping Co.*, the First Circuit held that a court may consolidate arbitration proceedings if the parties' arbitration agreement is silent on the issue and if the relevant state's law specifically provides for consolidation. 855 F.2d at 5. But, as noted above, this was only within the context of where the consolidation order did not contradict any of the terms in the arbitration agreement. *See id.* In any event, none of the Named Claimants resides in a jurisdiction within the First Circuit. And moreover, as further noted earlier, the contract laws of California, Connecticut, Colorado, Illinois, Indiana, Michigan, Missouri, New Jersey, and New York prohibit an arbitrator from disregarding or modifying the terms of the parties' agreement. Indeed, California and Michigan courts have specifically refused to consolidate arbitration proceedings where consolidation would be contrary to the parties' intent or would contradict specific provisions in the parties' arbitration agreements, including the agreements' place of arbitration provisions. *See Hyundai Am.*, 26 F. Supp. 2d at 1218-20; *see also Parker v. McCaw*, 125 Cal. App. 4th 1494, 1505 (2005) ("Court-ordered consolidation does not achieve substantial justice under the circumstances if it substantially alters a party's contractual rights, or it results in unfair prejudice."); *Bay County Bldg. Auth. v. Spence Bros.*, 362 N.W.2d 739, 742 (Mich. Ct. App. 1984) ("[H]owever sound they may consider consolidated arbitration to be as a matter of policy, courts are not empowered to direct parties to undertake it when one of them objects.").

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& Co.-U.S. Operations, 26 F. Supp. 2d 1217, 1218-20 (N.D. Cal. 1998); *Cullman Ventures, Inc. v. Conk*, 252 A.D.2d 222, 229 (N.Y. App. Div. 1998); *Balfour v. Commercial Metals Co.*, 607 P.2d 856, 857 (Wash. 1980). Because the Arbitrator does not have the power to disregard terms in Cintas' arbitration agreements, the Arbitrator should reject consolidation of the Claimants' proceedings. *See Cullman*, 252 A.D.2d at 229 ("A court's failure to give effect to provisions in separate agreements contemplating separate arbitrations is an unauthorized reformation of those contracts.").

4. The Arbitrator Cannot Consolidate Multiple Arbitration Proceedings Where Each Proceeding Requires Individualized Factual Analysis

Some courts have held that consolidation of arbitration proceedings is permissible, but only where "no substantial right is prejudiced." *Robinson v. Warner*, 370 F. Supp. 828, 829 (D.R.I. 1974); *see also Seguro de Servicio de Salud*, 878 F.2d at 8; *Compania Espanola de Petroleos, S. A. v. Nereus Shipping, S. A.*, 527 F.2d 966, 974-75 (2d Cir. 1975).[23] Here as noted above, each individual arbitration proceeding will require fact-intensive inquiries into each Claimant's individual job duties and employment relationship with Cintas.

Among other things, resolution of each individual Claimants' dispute will require a fact-intensive inquiry of each Claimant's specific employment circumstances to determine if a FLSA exemption applies to that Claimant. For example, application of the MCA Exemption will involve highly individualized facts about each Claimant, each Claimant's route, each Claimant's job duties, the Claimant's vehicle, and exactly which each Claimant's vehicle carries. Likewise, the Outside Sales Exemption, will turn on facts specific to each individual Claimant. Because individualized issues of fact will predominate, consolidation is not appropriate here—particularly given that it is inconsistent with the plain language of the employment agreements.

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[23] Subsequent Second Circuit decisions have limited the holding in *Nereus* to situations where the parties "were bound by the same arbitration agreement." *See N. River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 165 (2d Cir. 1995). Accordingly, the *Nereus* holding no longer permits consolidation where the parties have entered into "separate contractual agreements to arbitrate." *Id.*

V. CONCLUSION

Because the language of the Arbitration Agreements contains no terms that can be construed to permit arbitration to proceed on behalf of a class, Cintas is entitled to a Clause Construction Award so holding. To reach a contrary result, the Arbitrator would have to ignore and invalidate express terms in the Arbitration Agreements—which is something the Arbitrator is without the jurisdiction, authority or power to do. The reasoning relied on by Arbitrator Meyerson in other cases to permit class arbitration would run afoul of rulings already rendered by the District Court in this action. Accordingly, and under Supplemental Rule 1(c) and otherwise, the Arbitrator here has no discretion to deviate from Judge Armstrong's rulings.

Cintas is further entitled to a Clause Construction Award ruling that the individual Named Claimants cannot pursue their individual claims collectively, either among themselves or with any number of other potential claimants. Absent a provision in the parties' agreements allowing consolidation, it is not permitted as a matter of law—particularly where, as here, allowing this diverse group of Named Claimants would result in the wholesale disregard of the express place-of-arbitration terms in each of their Arbitration Agreements as well as the arbitration agreements of any other potential claimants they hope to represent.

Respectfully submitted,

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